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Supreme Court, U.S.
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Nº. 01-1517

In The Supreme Court of the United States

JOSEPH M. POPOVICH,
Petitioner,

v.

COMMON PLEAS COURT OF CUYAHOGA COUNTY, OHIO DIVISION OF DOMESTIC RELATIONS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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15 pgs

QUESTIONS PRESENTED FOR REVIEW

Petitioner Popovich presents the following questions seeking review by this Court. The questions presented are:

1. Does a state waive its Eleventh Amendment immunity from suit by its affirmative litigation conduct when it enters an appearance in an action, defends on the merits for several years, seeks a judgment on the merits, and fails to raise the issue of Eleventh Amendment immunity in the district court or in its original brief on appeal?

2. Did Congress exceed the authority granted to it by Section 5 of the Fourteenth Amendment when it enacted Title II of the Americans with Disabilities Act and in so doing abrogated the state's immunity from suit?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties to the proceedings in the court below should include the United States of America, which intervened on appeal in the Sixth Circuit on the side of Petitioner.

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No. 01 - 1517

SUPREME COURT OF THE UNITED STATES

October Term, 2001

JOSEPH M. POPOVICH,

Petitioner,

v.

CUYAHOGA COUNTY COURT OF COMMON PLEAS, DIVISION OF DOMESTIC RELATIONS,

Respondent.

Response and Opposition to Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

Respondent prays that the Writ of *Certiorari* as sought by Petitioner, Joseph M. Popovich, be denied on question one and be granted on question two consistent with the questions presented for review in the pending petition filed by Respondent, as the Petitioner, in Docket No. 01-1503.

STATEMENT OF THE CASE

1. Petitioner, Joseph M. Popovich, was a party to post-decree motions concerning custody of a child filed by his ex-wife in August, 1990 in the Cuyahoga County Court of Common Pleas, Division Of Domestic Relations ("State Court"). Popovich, after identifying a hearing disability

unknown to the State Court, was provided with the accommodation for his hearing deficit recommended by the professional audiologist who tested Popovich's hearing. Popovich, after requesting a recess, demanded, by motion, a specific and different accommodation in December of 1992, seeking real time captioning.

2. In September, 1995, Popovich asserted a claim for money damages against the State Court, several state court judges, and Cuyahoga County. In response to this Amended Complaint, all defendants pled immunity from suit.

3. All parties consented to the referral of the case to the magistrate for trial in January of 1998. On the eve of commencing trial, Popovich voluntarily dismissed all of the individual defendant judges and abandoned his §1983 claims.

4. A verdict for $400,000 was returned against the remaining defendants, the State Court and Cuyahoga County. The Magistrate Judge entered an order granting an injunction and incorporating the verdict and then considered defendants' motion for judgment notwithstanding the verdict. JNOV was granted to Cuyahoga County, but JNOV was denied to the State Court.

5. The State Court's opening brief in the Sixth Circuit did not raise Eleventh Amendment immunity. It raised judicial immunity, focusing exclusively on non-constitutional grounds. The State Court's responsive brief did raise the issue of whether or not Congress in enacting Title II properly

abrogated the State Court's Eleventh Amendment immunity and Popovich replied to this brief.

7. This issue was the central argument presented by all sides to the panel. The Eleventh Amendment immunity issue was the subject of extensive letter briefs following argument and the exclusive subject of the briefs *en banc* following the decision in *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). A sharply divided *en banc* court agreed with the original panel, in part, holding, "[I]t is clear after *Garrett* that congressional authority under section 5 to enforce the Equal Protection Clause is limited and will not sustain the Disabilities Act as an exception to Eleventh Amendment state immunity."

8. The *en banc* decision nonetheless found that a Due Process theory was presented in child custody disputes with a hearing impaired parent, which passed constitutional muster as applied, and remanded the case for a new trial under this theory.

SUMMARY OF THE ARGUMENT

Although here, the issue was both raised and fully briefed to the panel on appeal and *en banc*, as a jurisdictional matter, it may be considered by the court at any time. The Eleventh Amendment immunity was the exclusive issue presented *en banc*.

Simply, Popovich seeks to review the entire jurisprudence and progeny of *Edelman v. Jordan*, 415 U.S. 651 (1974), holding that sovereign immunity may be raised for the first time on appeal.

The issue was raised by the State Court on appeal and Popovich had a full opportunity to respond and argue the matter. After *Garrett*, the circuits remain split on the constitutionality of Title II. The Sixth Circuit's *en banc* opinion significantly erodes any clarity on the jurisdiction of federal courts to hear private damage suits against states under Title II of the ADA.

Contrary to Popovich's suggestion, the Circuit panel and *en banc* treated the Eleventh Amendment immunity issue as being appropriately raised and not waived. The panel went out of its way to ensure that the issue was fully addressed by requesting post-argument letter briefs. Indeed, the Sixth Circuit's approach to waiver is consistent with every other circuit.

Before *Lapides v. Bd. of Regents of the Univ. System of Georgia*, ___ U.S. ___, 122 S. Ct. 1640 (2002), there was no litigation behavior waiver applied to asserting Eleventh Amendment immunity. The State Court submits that removal is a special circumstance. This case does not present any issues related to removal from state court by the state. The parameters of *Lapides* must be left to percolate in opinions defining whether any other reasons exist to expand this limited rule.

The *en banc* decision directs a case-by-case as applied analysis of ADA Title II claims to determine whether there is a claim sounding in due process. Thus, states and private litigants are faced with continuing uncertainty.

The panel of the United States Court of Appeals for the Sixth Circuit held that the state was immune from plaintiff's ADA suit for damages under the Eleventh Amendment and dismissed the suit.[1] They found that: "... equal protection was not a constitutionally sufficient basis on which to rest the ADA's abrogation of Eleventh Amendment immunity, ..."

On rehearing *en banc*, the full court remanded the case for a retrial in light of potential claim sounding in due process by a 7 - 6 vote. In a vigorous dissent, Judge Ryan criticized the majority's failure to be guided by the analysis of the issue by this Court's decisions in *Garrett, supra; Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); and *City of Boerne v. Flores*, 521 U.S. 507 (1997).

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1 Because sovereign immunity claims are jurisdictional, they cannot be waived even if not presented as a defense to the trial court. See *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (holding Eleventh Amendment defense cannot be waived, as it divests the court of jurisdiction.).

ARGUMENT

1. The First Question Regarding Waiver Does Not Merit Discretionary Review by This Court.

The issue does not rise out of a conflict in the circuits or any other basis for granting *certiorari*. The principal question addressed by the State Court is whether a state waives its claim to assert Eleventh Amendment sovereign immunity by failing to raise it in a clearly articulated manner initially in the trial court. This question has been addressed by this Court and subsequently in the courts of appeals without any court agreeing with Popovich's issue. It is clear that unless compelling circumstances are presented the Courts of Appeals are reticent to find a waiver of Eleventh Amendment immunity. Cases such as those cited by Popovich suggest some fundamental unfairness not found here.

Popovich places misguided reliance on *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), as implicitly approving waiver. *Yeskey* reinforces the principle that issues not raised below may not be raised before this Court for the first time. In the instant case, both the panel and the circuit *en banc* were fully presented in argument and briefs the Eleventh Amendment immunity issue. Both the panel of the court below, as well as to the entire circuit *en banc* were fully informed. The teachings of *Yeskey* comport with existing precedent: the concept of waiver does not present an issue worthy of review by this Court.

The panel did not find the waiver issue of any magnitude under the existing jurisprudence of the Sixth Circuit. In fact, the reliance on *Edelman v. Jordan*, 415 U.S. 651 (1974), is entirely consistent with this Court's decisions and those of other circuit courts. Sovereign immunity is considered jurisdictional. *Koehler v. United States*, 153 F.3d 263, 267 (5th Cir. 1998).

The Sixth Circuit has determined that Eleventh Amendment immunity presents a jurisdictional question which may be raised on appeal or not at all. *Mixon v. State of Ohio*, 193 F.3d 389 (6th Cir. 1999). The Fifth Circuit approaches this issue in the same manner. A lack of subject matter jurisdiction may be raised at any time, which means a reviewing court can examine the district court's subject matter jurisdiction for the first time on appeal. *Giles v. Nylcare Health Plans, Inc.*, 172 F.3d 332, 336 (5th Cir. 1999). The change urged in granting the petition on the waiver issue would require changes in the entire body of law on subject matter jurisdictional challenges.

Further, there is no underlying importance to the waiver question for citizens. The fact-bound determination sought by Popovich in this case will spawn a period of uncertainty for the States as to how and when Eleventh Amendment immunity must be asserted or pled to prevent waiver of rights reserved to the states in our system of dual sovereignty.

This case is not an instance where multiple appeals have been prosecuted and litigated and Eleventh Amendment

immunity was first asserted during the fourth round of appeals to the circuit court. See: *In re SDDS, Inc. v. State of South Dakota*, 225 F.3d 970 (8th Cir. 2000). Respondent opposes granting a writ of *certiorari* on the waiver issue.

2. The Important Issues Concerning Abrogation of Eleventh Amendment Immunity Must Address Private Persons Seeking Money Damages Missing in the Statement of Question 2.

The State Court submits that the important issues presented on whether or not Congress effectively abrogated the Eleventh Amendment immunity of the states to suits for money damages by private persons in the enactment of Title II of the ADA must be addressed and are pending in this case before this Court.

CONCLUSION

For these reasons, this case warrants the exercise of this Court's discretionary *certiorari* jurisdiction on question 2. Popovich's petition for a writ of *certiorari* should be denied on question 1.

Respectfully submitted,

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